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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN ALEXANDER ESPINOZA,

Defendant and Appellant.

C069975

(Super. Ct. No. 095822)

A jury convicted defendant Nathan Alexander Espinoza of second degree robbery, conspiracy to commit robbery, receiving stolen property, conspiracy to evade a peace officer, and resisting or obstructing a peace officer. The trial court sentenced him to an aggregate term of three years in prison.

Defendant contends his convictions for robbery and conspiracy to commit robbery must be reversed because the trial court prejudicially erred in instructing the jury with CALCRIM No. 1603 [robbery: intent of aider and abettor]. Although he concedes that

CALCRIM No. 1603 is a correct statement of the law, he contends the instruction was erroneous as applied to the facts of this case.

We conclude defendant's contention is forfeited because he did not ask the trial court for an amplifying or clarifying instruction on this issue. We will affirm the judgment.

## BACKGROUND

Codefendant Aaron Dufour entered a Taco Bell restaurant in Woodland, concealing his identity. He displayed what appeared to be a firearm and ordered Taco Bell employee Leticia Ayala to give him cash in a bag. Dufour then returned to the parking lot and got into a gray car, which drove onto Interstate 5. Police were alerted and arrived within five minutes.

Davis Police Officer Pheng Ly, patrolling in Davis, received an alert from the Woodland Police Department regarding the Taco Bell robbery, including a description of the getaway vehicle. Officer Ly subsequently saw a Pontiac resembling the car described in the alert. The car did not have a front license plate and its windows were tinted. Officer Ly tried to get behind the Pontiac to make a vehicle stop for the Vehicle Code violations, but the Pontiac drove onto Interstate 80 and accelerated. Officer Ly accelerated to 110 miles per hour but did not catch up. He notified dispatch of the pursuit and the need for backup.

Officer Ly followed the Pontiac onto Mace Boulevard and activated his lights. The Pontiac drove over 100 miles per hour on Second Street. Three other police officers joined Officer Ly in pursuit of the Pontiac. The Pontiac crashed and two people fled from the car. Dufour was apprehended after a 20-minute search. He said he was a passenger in the Pontiac.

Police determined that defendant owned the Pontiac. Executing a search warrant on the Pontiac, an officer found money inside a Taco Bell bag, a black soft air gun inside a duffel bag, cell phones belonging to defendant and Dufour, and a wallet with

defendant's identification. Executing a search warrant at defendant's residence, officers found Dufour's car in the parking lot of the apartment complex. Ayala identified the Pontiac with 90 percent certainty as the car she saw in the Taco Bell parking lot.

Defendant was arrested. He claimed he had been at his girlfriend's house fixing a flat tire on his car and locked his keys, cell phone and wallet in the car. He said the car was subsequently stolen.

The jury convicted defendant of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c) -- count 3),<sup>1</sup> conspiracy to commit robbery (§§ 182, subd. (a)(1)/211, 212.5, subd. (c) -- count 4), conspiracy to evade a peace officer (§§ 182, subd. (a)(1)/Veh. Code, § 2800.2, subd. (a) -- count 6), receiving stolen property (§ 496, subd. (a) -- count 7), and resisting or obstructing a peace officer (§ 148, subd. (a)(1) -- count 10).

The trial court sentenced defendant to the midterm of three years in prison for the second degree robbery; three years for conspiracy to commit robbery, stayed pursuant to section 654; a concurrent two years for conspiracy to evade a peace officer; a concurrent two years for receiving stolen property; and a concurrent 180 days in jail for resisting or obstructing a peace officer.

#### DISCUSSION

Defendant contends the trial court prejudicially erred in instructing the jury with CALCRIM No. 1603 [robbery as an aider and abettor].

Among other things, the trial court instructed the jury as follows: "To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety. [¶] A perpetrator has reached a place of temporary safety

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

with the property if he or she has successfully escaped from the scene, is no longer being pursued, and has unchallenged possession of the property.”

Defendant did not object to the instruction, and he concedes that it is a correct statement of the law, citing *People v. Cooper* (1991) 53 Cal.3d 1158, 1165-1166. He asserts, however, that the instruction was erroneous as applied to the facts of this case because he did not know Dufour had robbed the Taco Bell “any sooner than the time they fled from the police” and he and Dufour had reached a place of temporary safety before the police pursuit began in Davis.

Defendant’s claim is forfeited. To preserve his claim that the legally correct instruction was inadequate to inform the jury on the law as applied to the particular facts, a party must request an amplifying or clarifying instruction in the trial court. (*People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Hart* (1999) 20 Cal.4th 546, 622.) Defendant did not ask the trial court for an amplifying or clarifying instruction on this point.

Defendant notes that even though he did not object or request a clarifying instruction in the trial court, we can nonetheless consider his contention. He cites section 1259, which provides that an appellate court may review an instruction, even when no objection was made in the trial court, if the instruction affected defendant’s substantial rights. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 749.) We decline defendant’s invitation, however, because on this record the instruction did not affect his substantial rights.

Whether a robber has reached a place of temporary safety is a question of fact for the jury. (*People v. Johnson* (1992) 5 Cal.App.4th 552, 559.) The standard for determining whether the robber has done so is objective; the robber’s subjective belief that he has done so is at most one issue for the jury to consider. (*Id.* at pp. 560-561.)

Defendant argues that he and Dufour reached a place of temporary safety because they were not followed from the scene of the crime, the police did not know where they

were for more than an hour, defendant and Dufour were in unchallenged possession of the loot during that time, and they travelled approximately 12 miles before Officer Ly spotted them. But the Woodland police responded to the crime in five minutes and alerted law enforcement in other areas, complete with a description of the getaway car accurate enough for Officer Ly to spot it in Davis. Substantial evidence supports the instruction.

Defendant relies on *People v. Ford* (1966) 65 Cal.2d 41, but that case is distinguishable. The relevant question in that case was whether a robbery was still in process at the time the defendant shot an officer, thereby supporting a conviction for first degree murder under the felony murder rule. (*People v. Ford*, 65 Cal.2d at pp. 55-56.) The Supreme Court concluded, considering the facts as a whole, that the robbery terminated prior to the homicide because many hours elapsed between the robbery and the shooting; there was strong evidence that the defendant was not endeavoring to escape the robbery when the shooting occurred; the officer was not pursuing the defendant because of the robbery; there was no showing at trial that the police knew of the robbery until later; the defendant already spent some of the loot prior to the shooting; and the defendant had “won” his way to places of temporary safety prior to the homicide. (*Id.* at pp. 56-57.) Those facts are very different from the facts in this case.

#### DISPOSITION

The judgment is affirmed.

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MAURO, J.

We concur:

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BLEASE, Acting P. J.

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HULL, J.